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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUAN ANGEL RUIZ, Appellant.	)	2 CA-CR 2009-0349 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090803002

Honorable John S. Leonardo, Judge

AFFIRMED IN PART; MODIFIED IN PART; VACATED IN PART AND REMANDED

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B R A M M E R, Judge.

¶1 Appellant Juan Ruiz was charged with second-degree burglary, a class three felony; possession of burglary tools, a class six felony; and theft by control, a class five felony. Following a two-day jury trial, he was convicted of all three offenses. The trial court suspended the imposition of sentence, placed Ruiz on concurrent, three-year terms of probation, and ordered him to pay a total of $1,589.76 in restitution. Counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating he had reviewed the record thoroughly and has found no meritorious issues to raise on appeal. He asked this court to search the record for fundamental error, which we did, finding a potential error regarding the classification of one of the offenses and a resulting sentencing error. We directed the parties to file briefs on this issue, which they have done.

¶2 Viewed in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence was sufficient to support the jury's finding of guilt. However, as stated above, in reviewing the record for reversible error pursuant to *Anders*, we discovered that count three of the indictment charged Ruiz with theft by control of stolen property "with a value of $2,000 or more, but less than $3,000," which it correctly designated as a class five felony. *See* A.R.S. § 13-1802(G).

¶3 After both sides rested, the trial court granted, in part, Ruiz's motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. The court agreed there was insufficient evidence for a jury to find the value of the stolen items exceeded $2,000, and reduced the range of the value of the stolen items from the value in the indictment,

$2,000 or more but less than $3,000, to $1,000 or more but less than $2,000. At Ruiz's request, and without objection, the court corrected the special interrogatory on the theft verdict form asking the jury to determine the value of the property Ruiz had stolen to reflect the new dollar range. The jury marked the space on the interrogatory indicating it had found the value of the property to be "$1,000 or More, But Less than $2,000."

¶4 Section 13-1802(G), A.R.S.,[1] provides that "[t]heft of property . . . with a value of two thousand dollars or more but less than three thousand dollars is a class 5 felony. Theft of property . . . with a value of one thousand dollars or more but less than two thousand dollars is a class 6 felony." Although the indictment charged Ruiz with a class five felony, as a result of the court granting Ruiz's motion, the amount presented to the jury corresponded with a class six, rather than a class five felony. Ruiz was nonetheless convicted of and sentenced for a class five felony.

¶5 As the state correctly pointed out in the brief it filed at our direction, because Ruiz did not object to the form of verdict, he has waived the right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We find, and the state concedes, that the error here was fundamental. The value range of stolen property is an element of theft that must be found by a jury beyond a reasonable doubt. The property's value determines the classification of the offense, and the classification of the offense determines the sentencing range to which a defendant is exposed. *See State v. Rushing*, 156 Ariz. 1, 4-5, 749 P.2d 910, 913-

[1]The statute was amended in 2009 and subsection E became subsection G. *See* 2009 Ariz. Sess. Laws, ch. 119, § 2.

14 (1988) (reducing classification of theft conviction based on value of item stolen and remanding for resentencing). Ruiz was sentenced for a class five felony without the jury having made the necessary finding for that classification of the offense. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) ("Imposition of an illegal sentence constitutes fundamental error."); *cf. Blakely v. Washington*, 542 U.S. 296, 303 (2004) (maximum statutory sentence that which "judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*"). Although the recommended term of probation is the same for class five and six felonies, *see* A.R.S. § 13-902(A)(4), the trial court was not obligated to impose the three-year term, and may or may not have done so had it known the theft conviction was a class six rather than a class five felony. *Cf. State v. Ojeda*, 159 Ariz. 560, 561-62, 769 P.2d 1006, 1007-08 (1989) (if sentencing judge relies on inappropriate factors and unclear whether judge would have imposed same sentence absent those factors, appellate court must remand for resentencing).

¶6 The state contends, however, the error was not prejudicial because the evidence was such that no reasonable juror could have concluded the stolen property's value was less than $2,000, and insists that no remedy is necessary. We disagree. Whether fundamental error is prejudicial "involves a fact-intensive inquiry . . . ." *Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608. Here, the trial court found Ruiz had committed a class five felony based on a jury finding that was legally insufficient. And, as discussed below, we disagree with the state's suggestion that no reasonable juror could have found the value of the property at the time of the theft was less than $2,000,

rendering any error harmless. We therefore conclude Ruiz has been prejudiced by the fundamental error.

¶7 For purposes of § 13-1802, the evidence must establish the relevant fair market value of the property at the time of the offense. *State v. Wolter*, 197 Ariz. 190, ¶ 1, 3 P.3d 1110, 1111 (App. 2000); *State v. Blankinship*, 127 Ariz. 507, 511, 622 P.2d 66, 70 (App. 1980). The state relies on the victim's testimony that the purchase price of the stolen items was approximately $2,200. However, on cross-examination the victim estimated the purchase price of a computer he had purchased "probably around 2007" to be $700, while estimating the replacement value of the stolen "DVD's," which he had purchased "[o]ver the course of time," at "approximately" $200. The victim also acknowledged that fair market value is "probably . . . much less" than replacement value. Notably, the state concedes there was no testimony as to the dollar value of some of the stolen items, including the "Wii" entertainment system, jewelry, and collectable currency, but contends the jury was able to infer the value of those items. Moreover, the state offered no testimony about the fair market value of any of the stolen items or whether their value had depreciated over time. Thus, the evidence relating to the value of the items at the time of the theft was, at the very least, unclear. Contrary to the state's assertion, a reasonable juror could have found the value of the stolen property was less than $2,000. Moreover, as previously noted, the court expressly found "insufficient evidence for a jury to find anything beyond 2000 dollars at most."

¶8 We therefore modify Ruiz's conviction on count three, reduce the class of felony to a class six, vacate the sentence on that count, and remand this matter to the trial

court for resentencing on count three. In all other respects, having found no other error that is both fundamental and prejudicial, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge